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Money Penalties — An Administrative Sword of Damocles

*Charlotte P. Murphy**

Administrative penalties embrace a relatively uncharted area in the administrative law field, for only in rare instances do these rulings ever come under judicial scrutiny. This area, though apparently reviewable, in reality exists virtually unnoticed due to the extreme informality of the procedures involved and the dearth of instances of judicial consideration of the administrative action taken. However, the effect of administrative penalties may be far reaching, involve sizeable sums of money, and affect a variety of clients.

If the problems surrounding administrative penalties are little known, the attendant procedures are even more obscure. Being virtually unreviewable, the procedures for fixing and contesting such penalties should contain adequate safeguards to insure that these procedures are stable, fair and expeditious. Such procedures should also be reasonable in relation to the purpose involved, for the consequences of administrative penalty action may well touch the lives of even the least conspicuous of citizens.

The following examples of the administrative penalty are drawn principally from the specialized fields of aviation and immigration and nationality. They are intended to be illustrative and symptomatic, rather than an exhaustive treatment of the subject. Since criminal penalties, arising from violations of statutes administered by the various agencies, may not be imposed except upon recourse to the courts, such penalties are purposely excluded from consideration here.

AVIATION

A complex system of administrative penalties was provided by the Civil Aeronautics Act of 1938, as amended,¹ and more recently by the Federal Aviation Act of 1958.²

Penalties are set for violations of statutory provisions or administrative regulations and orders arising under titles III, V, VI, VII and XII of the Federal Aviation Act at a maximum of \$1,000 per violation, with a provision allowing for compromise of the amount by the CAB or the FAA as the situation dictates.³

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¹ 72 Stat. 806 (1958), 49 U.S.C. § 401 (1958).

² 72 Stat. 731 (1958), 49 U.S.C. § 1301 (1958).

³ 72 Stat. 783 (1958), 49 U.S.C. § 1471 (1958); 14 C.F.R. § 408.23 (1961).

The FAA has jurisdiction to enforce penalties arising from violations of titles III (Air Space and Airport Control), V (Nationality and Ownership of Aircraft), VI (Civil Aviation Safety Regulation) and XII (Security Control), as well as violations of "any rule, regulation or order," touching on the enumerated portions of the Act.⁴ Regulations previously in effect continue unless and until repealed, with necessary changes outlined in the Register.⁵

ENFORCEMENT OF PENALTIES

Under the Federal Aviation Act, enforcement of penalties remain primarily with FAA, which promulgates regulations for this purpose. Although section 901(a)(2)⁶ gives authority to compromise the amount of the penalty, the FAA may refuse to do so and elect to go directly to the United States District Court for enforcement. However, this is not the usual approach.

In practice, the FAA's field organization prepares the violation reports, whether arising out of violation of statute, regulation or order, for the action of the FAA. The FAA then reaches its decision by acting through its regional attorneys without the benefit of a formal hearing. The regulations⁷ provide that the alleged violator may submit an answer orally or in writing, setting out facts in mitigation, explanation, or circumstances in extenuation of the charge, or he may merely file a denial of the allegations and the reported violation.

At that point, a so-called civil penalty letter may be sent to the violator with a suggested compromise figure. This amount may range from twenty-five to nine hundred dollars. If the appropriate penalty would be less than twenty-five dollars, then the violator receives a reprimand and a report of the violation investigation is merely filed.⁸

If the violator fails to pay the suggested amount, then by agreement with the Department of Justice, FAA submits it directly to the appropriate United States Attorney for enforcement of the penalty. From this point on, FAA participates only indirectly, making available whatever technical assistance is required by the United States Attorney.⁹

Title VII of the Act¹⁰ relates to aircraft accident investigations and under

⁴ 14 C.F.R. § 408.23 (1961).

⁵ 24 Fed. Reg. 5 (1959).

⁶ 72 Stat. 784 (1958), 49 U.S.C. § 1471 (a) (2) (1958).

⁷ 14 C.F.R. § 408.23 (1961).

⁸ 14 C.F.R. §§ 408.21, 408.22 (1961).

⁹ 14 C.F.R. § 408.23 (1961); *but see*, 14 C.F.R. § 408.24 (1961).

¹⁰ 72 Stat. 781 (1958), 49 U.S.C. § 1441 (1958).

this title, the CAB has primary authority. Section 701 (a) delegates to the CAB responsibility to lay down regulations relating to civil aircraft accident notification and reports. Upon failure to file the required accident reports with FAA, the latter refers the case to the CAB's Office of Compliance for action under section 901. If the violation of the regulations is minor or the infraction is an initial violation, only a letter of reprimand is sent. If, on the other hand, the violation is serious with aggravated circumstances, perhaps suggesting wilfulness, a so-called compromise letter is sent.¹¹

This letter to the alleged violator, suggests that he might want to make a compromise settlement offer in a given amount (evidenced by a certified check) acceptance of which the Office of Compliance might be willing to recommend to the Board. The letter makes clear the violator is under no compulsion to follow this lead, for he is entitled to have the United States District Court determine the liability. At the same time, the opportunity to present information in explanation or mitigation during the ensuing ten-day period is invited.

Cases in which compromises have not been effected are few and consequently, the number of instances of judicial consideration of such violations are rare.¹²

In addition to the compromise approach for settlement of alleged violations, summary seizure of the aircraft is also possible under section 903.¹³ Upon such seizure, a written notice thereof should be sent "without delay" to the registered owner or persons with a recorded property interest in the plane. This notice should contain the details of seizure (time, date, place of seizure), name and present location of the plane, as well as a statement of the basis of the violation charged, and the amount required for release of the plane.

Simultaneously, the FAA Regional Administrator is required to notify the United States Attorney of the seizure and request him to seek judicial enforcement of the lien. Methods by which such a seized plane may be released are described in the regulations.¹⁴

¹¹ 14 C.F.R. § 408.23 & n.1 (1961).

¹² The following libel actions have been filed in recent years based on §§ 701 and 901: *United States v. Marsh* (E.D. Mich.), dismissed March 3, 1952, for lack of service; *United States v. Bigelow* (D. Mass.), dismissed with prejudice January 11, 1952, violator being mentally incompetent; *United States v. Graves* (S.D. Ind.), dismissed for lack of service; *United States v. Cleary* (D. Minn.), judgment for \$50 entered January 11, 1954; *United States v. Peabody* (E.D. Tex.), judgment for \$100 entered January 9, 1954; *United States v. Blank* (D. Wyo.), default judgment for \$1,000 entered April 25, 1958; *United States v. McCarthy* (D.D.C.), dismissed September 10, 1958, upon payment of \$100.

¹³ 72 Stat. 787 (1958), 49 U.S.C. § 1474 (b) (1958).

¹⁴ 14 C.F.R. § 408.24 (1961).

This enforcement procedure is seldom used, except in aggravated situations or if the owner or operator seems likely to flee the country. This approach differs in one important respect from related procedures found in the customs and immigration areas, for FAA and CAB are concerned primarily with the violation and the violator, while customs and immigration penalties are aimed chiefly at the *res* (the airplane or the ship) involved.

IMMIGRATION VIOLATIONS

In the area of immigration, administrative penalty provisions are varied and complex. The Immigration and Nationality Act of 1952¹⁵ contains some dozen sections spelling out offenses, with penalties ranging from ten dollars to five thousand dollars. Since each year several hundred thousand dollars in fines are imposed administratively against shipping companies and air lines, it is natural that there should be increasing interest in this phase of immigration law.

The penalties set out in the Act are of two types. First, penalties for the commission of acts designated as criminal offenses, e.g., criminal penalties for smuggling aliens or assisting excludable aliens to enter;¹⁶ specific provisions against the illegal entry of aliens;¹⁷ the misdemeanor (by a crewman) of willfully remaining in the United States longer than the authorized period of admission.¹⁸

The remainder are civil penalties, recoverable either administratively or judicially.¹⁹ Virtually all such penalties are obtained through administrative fine proceedings conducted by the Immigration Service.²⁰ Although the statute provides that determinations of liability for fines are made by the Attorney General, such decisions are actually made by subordinates in the Immigration Service, to whom the duty has been delegated by regulation.

The adjudication of liability and the imposition of fine, although an administrative function of the Attorney General, must be performed with full observance of procedural due process.²¹ To date, the Immigration Service has taken the view that constitutional due process does not require participation by the carrier in the exclusion or expulsion proceedings from which the penalty arose.

¹⁵ 66 Stat. 163 (1952), 8 U.S.C. § 1101 (1958).

¹⁶ 66 Stat. 228-230 (1952), 8 U.S.C. §§ 1324, 1327, 1328, 1329 (1958).

¹⁷ 66 Stat. 229 (1952), 8 U.S.C. §§ 1325-1326 (1958).

¹⁸ 66 Stat. 221 (1952), 8 U.S.C. § 1282(c) (1958).

¹⁹ 66 Stat. 230 (1952), 8 U.S.C. § 1330 (1958).

²⁰ See, *United States v. Seaboard Surety Co.*, 239 F.2d 667 (4th Cir. 1956); *United States v. Holland-American Line*, 231 F.2d 373 (2d Cir. 1956); *Pan American Airlines v. United States*, 135 F.2d 51 (5th Cir. 1943).

²¹ *Lloyd Sabaudo Societa v. Elting*, 287 U.S. 329 (1932).

PROCEDURAL STEPS

The procedure for collection of administrative penalties is initiated by a notice of intention to fine (I & N Form I-79), served by an Immigration Service officer on the responsible person or persons set out in the statute.²² This notice lists in a general way the violation involved. Normally, a bond to cover the fine is then obtained (in lieu of a cash deposit) and accepted by the Collector of Customs in the region of arrival, to facilitate clearance for departure of the ship or plane, pending a final determination of the appropriateness of the fine.²³

According to the statute, one or more "persons" may be liable for a given penalty—a transportation company or the owner, master, commanding officer, agent, charterer, consignee of the ship or plane in question.²⁴ Whether the vessel is American or foreign owned is not crucial, although whether the ship is government owned may be important.²⁵

Through counsel or other representative of the carrier, a reply or protest to the notice of fine with or without supporting documents, may be filed at the Regional Office of the District Director of the Immigration Service in the area where the alleged violation occurred. The notice, reply and supporting documents, together with a factual statement by the Immigration Service officers involved, constitute the record for purposes of decision.²⁶ If a hearing is held by the Immigration Service to determine the admissibility of the aliens in question, the record of these proceedings is generally made part of the record in the fine case. Authority to conduct such hearings is found in section 235(a) of the Regulations.²⁷

Prior to the issuance of the decision, counsel or a representative of the shipping company or airline may have an interview with an appropriate officer in the Office of the District Director, stating reasons for opposing the imposition of the fine.²⁸ If the District Director issues an unfavorable decision, an appeal may be taken to the Board of Immigration Appeals, Department of Justice, before whom oral argument may be had in Washington, D.C.²⁹

Interestingly enough, the use of the interview format, rather than a hearing procedure, has been adopted by the Immigration Service in its

²² 8 C.F.R. §§ 280.1, 280.11 (1958).

²³ 8 C.F.R. §§ 280.6, 280.7 (1958). See also, *American President Lines, Inc. v. Mackey*, 120 F. Supp. 897 (D.D.C. 1953).

²⁴ See, *SS. Marilena, Freedman & Slater*, 7 I & N Dec. 453 (BIA, 1957), citing *United States v. Bernstein Steamship Line*, 44 F. Supp. 19 (S.D. N.Y. 1941).

²⁵ See, *United States v. American President Lines*, 95 F. Supp. 371 (E.D. N.Y. 1951).

²⁶ 8 C.F.R. § 280.14 (1958).

²⁷ 66 Stat. 198 (1952), 8 U.S.C. § 1225 (1958).

²⁸ 8 C.F.R. §§ 280.12, 280.13(b) (Supp. 1961).

²⁹ 8 C.F.R. §§ 3.1(b) (4), 3.1(e) (Supp. 1961).

processing of Adjustment of Status applications under section 245 of the Immigration and Nationality Act, as amended by Public Law 85-316.⁸⁰ However, there is one noticeable refinement in the section 245 procedure, for there is no appeal from an Immigration Service refusal of administrative relief, except indirectly through appeal to the Board of Immigration Appeals from an adverse ruling in a related Visa Petition proceeding.⁸¹

In connection with certain fines, the statute provides for mitigation or remission of such fines, but such mitigation or remission may be obtained only if an application for relief is filed.⁸²

The carrier may attempt to recover payments — fines, detention or deportation expenses — by suit in the United States Court of Claims or in the Federal District Court within six years of accrual of the right of action.⁸³ Because of a special statute of limitation,⁸⁴ a suit to recover a fine by the Government must be commenced within five years of the date the penalty accrued. However, a suit on a bond is not so limited.⁸⁵

The Immigration and Nationality Act contains no general provision relating to service of notices or papers in administrative proceedings. However, administrative regulations do require that a copy of the Notice of Intention to Fine "shall be served" on each person subject to the penalty by: (1) "delivering it to him in person"; (2) "leaving it at his office"; or (3) "mailing it to him at his office whenever the district director ascertains that the other two methods of service are inconvenient or impossible."⁸⁶

In case of personal service, an acknowledgment of service is required, attested by the Immigration Service officer serving the Notice. If acknowledgment is refused or if service is effected by leaving the Notice at the person's office or by sending it through the mail, the appropriate Immigration Service officer is required to indicate the method and date of service, as well as noting his signature.

The Notice of Intention to Fine must be made in triplicate, one copy for the person or persons charged with liability, another for the Collector of Customs in the district where the ship or plane is located, and the last copy for the Immigration Service.

⁸⁰ 71 Stat. 639, 641 (1957), 8 U.S.C. § 1255a (1958).

⁸¹ Matter of H.R., 7 I & N Dec. 651 (A.C., Ins. 1958); 8 C.F.R. § 245.1 (Supp. 1961).

⁸² 8 C.F.R. §§ 280.5, 280.51 (1958); see also 66 Stat. 203, 221, 223, 226, 227 (1952); 8 U.S.C. §§ 1229, 1284, 1286, 1321, 1323 (1958).

⁸³ 28 U.S.C. §§ 1346, 1491 (1958); *United States v. Prince Line*, 189 F.2d 286 (2d Cir. 1951); *Pan American World Airways v. United States*, 122 F. Supp. 682 (Ct. Cl. 1954).

⁸⁴ 28 U.S.C. § 2462 (1958).

⁸⁵ *A/S Glittre v. Dill*, 152 F. Supp. 934 (S.D. N.Y. 1957).

⁸⁶ 8 C.F.R. § 280.11 (1958).

FINE CATEGORIES

Substantively, immigration fine provisions may be grouped into several categories: (1) Penalties for bringing in excludable aliens.³⁷ (2) Penalties arising from lack of adherence to statutory procedures for identification, inspection, detention or deportation of alien passengers.³⁸ (3) Statutory requirements for detention and deportation of excludable or excluded aliens.³⁹ (4) Statutory measures for passenger protection.⁴⁰ (5) Rules for the control of alien seamen and stowaways.⁴¹ (6) Private aircraft provisions.⁴²

In cases arising under section 273(d),⁴³ it has been held that the notice to detain and the notice of intention to fine must be served on the same person and that person must be one of the legal persons on whom the statute imposes liability.

Bringing in excludable aliens. If an alien arrives at the port of entry without the necessary immigration documents,⁴⁴ the shipping company or airline is subject to a penalty of \$1,000 per alien. Under section 273,⁴⁵ such a fine may be remitted only if the air carrier or shipping line proves that its agents or employees actually exercised "reasonable diligence" (in investigating the alien's status for admissibility to the United States and possession of the required documents) and then failed to ascertain the existence of the visa irregularity.⁴⁶

In *Peninsular & Occidental Steamship Co. v. United States*,⁴⁷ in which the alien in question obtained a waiver of the required entry document after the initial application for admission at the port of entry without a visa, it was determined judicially that the subsequent waiver did not nullify the transportation company's liability for the fine under section 273.⁴⁸ This rule

³⁷ 66 Stat. 202, 226, 227 (1952), 8 U.S.C. §§ 1228, 1322, 1323 (1958).

³⁸ 66 Stat. 195, 198, 219, 226 (1952), 8 U.S.C. §§ 1221, 1225, 1281, 1321 (1958).

³⁹ 66 Stat. 196, 198, 201, 214 (1952), 8 U.S.C. §§ 1222, 1223, 1227, 1253 (1958).

⁴⁰ 66 Stat. 222 (1952), 8 U.S.C. 1285 (1958).

⁴¹ 66 Stat. 220-221, 223, 228 (1952), 8 U.S.C. §§ 1281-1284, 1286, 1287, 1323(d) (1958).

⁴² 66 Stat. 203 (1952), 8 U.S.C. § 1229 (1958).

⁴³ 66 Stat. 228 (1952), 8 U.S.C. § 1323(d) (1958); *SS. Morning Light*, States Marine Corp., 7 I & N Dec. 280 (BIA, 1956); *SS. Maria Theresa*, 1957 Am. Mar. Cas. 85 (BIA, 1956), which in turn relied on such precedents as *Companie Generale Transatlantique v. Elting*, 298 U.S. 217 (1935) and *Lancashire Shipping Co. v. Durning*, 98 F.2d 751 (2d Cir. 1938).

⁴⁴ 66 Stat. 181 (1952), 8 U.S.C. § 1181 (1958).

⁴⁵ 66 Stat. 227 (1952), 8 U.S.C. § 1323 (1958).

⁴⁶ *SS. "Florida," Peninsular & Occidental Steamship Co.*, 1 I & N Dec. 261, 262 (BIA, 1942), 3 I & N Dec. 111, 114, 123 (A.G., 1938). See also, *Flight 896/10*, Pan American Airlines, 8 I & N Dec. 498 (BIA, 1959); *Plane N-90674*, Pan American Airlines, 6 I & N Dec. 570 (1955); *Plane NG-88922*, Pan American Airlines, 3 I & N Dec. 234 (BIA, 1948); *SS. "New Amsterdam," Holland-American Steamship Line*, 1 I & N Dec. 87 (BIA, 1947).

⁴⁷ *Peninsular & Occidental Steamship Co. v. United States*, 242 F.2d 639 (5th Cir. 1957).

⁴⁸ *SS. Liberte, French Line*, 6 I & N Dec. 204 (BIA, 1954).

was subsequently changed through amendments to the administrative regulations.⁴⁹

Traditionally, the bulk of the immigration penalty cases arise under section 273. Many of the alien passengers involved hold expired visas or previously used single-entry visas.⁵⁰ Other aliens who possess valid visas or reentry permits leave them behind, put them in their luggage, or entrust them to others. These latter situations may be subject to adjustment without penalty, if the transportation company's employees actually examined the crucial document at the time the alien was cleared for departure for the United States.

A number of interesting defenses have been interposed from time to time for counsel for airline and steamship companies. These defenses, all of which have proved unavailing, include: impossibility of performance stemming from foreign law requirements at overseas departure points; clerical error, inadvertence or human mistake by employees in looking over documents prior to travel clearance; good faith on the part of the transportation company employees involved; and excuse—the extreme pressure of heavy passenger business and adverse flight conditions at the departure point.⁵¹

Also of interest are the recent political upheavals in Cuba, which have precipitated the unscheduled departure of many Cubans from their native land by boat or plane. Such refugee arrivals, understandably, have posed both exclusion and fine problems of considerable importance.

In addition, section 272⁵² makes it unlawful to bring an alien passenger, who is excludable under the immigration laws as feeble-minded, insane, afflicted with psychopathic personality, chronic alcoholism, leprosy or any dangerous contagious disease, or drug addiction.⁵³ The fine for a violation

⁴⁹ 8 C.F.R. § 211 (1961); Plane CUT-604, Cuban Airlines, 7 I & N Dec. 701 (BIA, 1958), *reaffirming* Plane CCA-CUT 532, Pan American Airlines, 6 I & N Dec. 262 (BIA, 1954). See also, Plane PH-LKA, Dutch Airlines, 7 I & N Dec. 704 (BIA, 1958); Flight 204, Pan American Airlines, 6 I & N Dec. 810 (BIA, 1955), arising under 8 C.F.R. § 211.3, as amended December 24, 1954 (19 Fed. Reg. 9173).

⁵⁰ Plane N-6104-C, Pan American Airlines, 6 I & N Dec. 819 (BIA, 1955).

⁵¹ Administrative regulations governing documentary requirements for immigrants and non-immigrants are found in 8 C.F.R. §§ 211.1-211.2, 212.1-212.7 (Supp. 1961). See also, M.S. Amagisan Maru, Burchard & Fisker Inc., 6 I & N Dec. 362 (BIA, 1954); Plane CUT-480, Pan American Airlines, 5 I & N Dec. 226 (BIA, 1953). See also, Canadian Pacific Airlines, 8 I & N Dec. 8 (BIA, 1957) in which no fine was assessed against a carrier signatory to a so-called Section 238 Overseas Agreement (imposing on agencies bringing an alien destined to the United States via Canada the same responsibility as if the passenger was brought directly to a United States port) if the alien was a returning resident or a native of contiguous territory with only documentary difficulties.

⁵² 66 Stat. 226 (1952), 8 U.S.C. § 1322 (1958).

⁵³ 66 Stat. 182 (1952), 8 U.S.C. § 1182(a)(1)-(4), (5), (6) (1958); see also, 8 C.F.R. §§ 236.1-236.6 (Supp. 1961), 42 C.F.R. §§ 34.1-34.14 (1960) and *Manual for Medical Examination of Aliens* (U.S. Public Health Service).

of section 272 is \$1,000 per afflicted alien, unless the alien has a valid, unexpired immigrant visa or meets certain technical requirements relating primarily to detectability of the disease or disability.⁵⁴

Section 238 gives the Attorney General power to contract with transportation companies for the entry and inspection of aliens coming to the United States through and from foreign contiguous territory or adjacent islands. By administrative regulations,⁵⁵ these contracts, as well as the necessary bonding agreements, are negotiated for the government by an Immigration Service Regional Commissioner. Such contracts are mandatory, if the transportation companies are to carry alien passengers. The statute further states:

In prescribing rules and regulations and making contracts for the entry and inspection of aliens applying for admission through foreign contiguous territory or through adjacent islands, due care shall be exercised to avoid any discriminatory action in favor of transportation companies transporting to such territory or islands aliens destined to the United States.⁵⁶

The phrase "contiguous territory" embraces Mexico and Canada. Regulations provide for inspection and medical examinations of aliens in contiguous territory or on adjacent islands.⁵⁷

Arrival procedures for alien passengers. Manifest lists covering both passengers and crewmen on ships or planes must be submitted upon arrival in the United States from and prior to departure for a foreign port. Failure to supply this information results in fines of \$10 per alien incorrectly listed or unlisted.⁵⁸

So-called Preinspection or a final, advance determination of admissibility (not to be confused with Preexamination of aliens in this country) of alien passengers and alien crewmen of a regular air carrier departing for continental United States destinations from airports is conducted regularly in Hawaii, Alaska, Guam, Puerto Rico and Virgin Islands by the Immigration Service.⁵⁹ Preinspection has also occurred in Canada (foreign contiguous territory) in the case of alien flight passengers and crews departing for continental United States airports.

⁵⁴ *Pan American Airways, Inc. v. United States* 135 F.2d 51 (5th Cir. 1943), *cert. den.* 320 U.S. 751; *Plane CF-CUR, Flight 303/19, Canadian Pacific Airlines*, 7 I & N Dec. (BIA, 1956); *SS. United States, United States Lines*, 6 I & N Dec. 467 (BIA, 1954).

⁵⁵ 8 C.F.R. § 238.1 (Supp. 1961).

⁵⁶ 66 Stat. 202 (1952), 8 U.S.C. § 1228 (1958).

⁵⁷ 8 C.F.R. § 238.11 (1958); *but see*, 8 C.F.R. § 238.1 (Supp. 1961); *see also*, *Plane N-90674, Pan American Airlines*, 6 I & N Dec. 570 (BIA, 1955).

⁵⁸ 66 Stat. 195, 219 (1952), 8 U.S.C. §§ 1221, 1281 (1958); *see also*, *SS. American Eagle*, 7 I & N Dec. (BIA, 1956); *SS. Monte Monjuich, Furness Withy & Co., Ltd.*, 5 I & N Dec. 601 (BIA, 1954); 8 C.F.R. §§ 231.1, 251.1 (Supp. 1961).

⁵⁹ 8 C.F.R. § 235.5 (b) (Supp. 1961).

The relationship between these sections and the provisions of the Convention on International Civil Aviation (or CICA)⁶⁰ also comes into play in fine proceedings under sections 231 and 251.⁶¹ Section 235⁶² outlines the authority of immigration officers to inspect arriving aliens, including the boarding and searching of all arriving ships and planes.

On the other hand, section 271⁶³ imposes a duty on the transportation company to prevent the unauthorized landing of alien passengers and crewmen at undesignated spots. Violation of this duty results in a fine of \$1,000, with mitigation and remission possible. This penalty becomes a lien on the plane or ship, which may be libeled.⁶⁴

Furthermore, section 271(b) provides: "proof that the alien failed to present himself at the time and place designated . . . shall be *prima facie* evidence that such alien has landed in the United States at a time and place other than that designated by the immigration officers."⁶⁵ Ports of entry, places designated for aliens to enter the United States and be inspected, are listed in the regulations.⁶⁶

Detention and deportation. Section 232⁶⁷ contains general power by which the Immigration Service may direct the detention of aliens for observation and examination in case of epidemic and other similar conditions, or facilitate a decision on whether these aliens are in fact excludable. Details of this procedure are spelled out by administrative regulations.⁶⁸

Immigration Service officers are given authority under section 233⁶⁹ to effect the temporary removal of aliens from arriving ships and planes to places appropriate for inspection and examination. The expenses of such a removal and any subsequent period of detention, pending an administrative decision on admissibility, are chargeable to the transportation company. Any

⁶⁰ Annex 9, International Standards & Recommended Practices—Facilitation, C.11(A), Paras. 11.3, 11.4, ICAO (3d ed. 1956).

⁶¹ 66 Stat. 195, 219 (1952), 8 U.S.C. §§ 1221, 1281 (1958); Plane 715, Pan American Airlines, 8 I & N Dec. 694 (BIA, 1960); Plane 774, Flight 59, Pan American Airlines, 7 I & N Dec. 403 (BIA, 1957); Plane N-102-A, Colonial Airlines, 6 I & N Dec. 628 (BIA, 1955).

⁶² 66 Stat. 198 (1952), 8 U.S.C. § 1225 (1958); 8 C.F.R. §§ 235.1-235.8 (Supp. 1961).

⁶³ 66 Stat. 226 (1952), 8 U.S.C. § 1321 (1958).

⁶⁴ Plane N-8224-H, National Airlines, 6 I & N Dec. 594 (BIA, 1955); Plane NC-SJD-004, Ecuadorian Airlines, 5 I & N Dec. 482 (BIA, 1953). *But see*, Flight 523, British Overseas Airlines, 8 I & N Dec. (BIA, 1955), in which the alien passenger was routed through the federal inspection facility at Philadelphia Airport, received Public Health and Customs' clearance, and could not have passed from the former to the latter without going through the immigration inspection area. See also, *SS. Enrico C.*, or *Matter of D.*, 8 I & N Dec. 323 (BIA, 1959), for a discussion of "landing."

⁶⁵ 66 Stat. 226 (1952), 8 U.S.C. § 1321(b) (1958).

⁶⁶ 8 C.F.R. § 1.51 (c) (2) (Supp. 1961).

⁶⁷ 66 Stat. 196 (1952), 8 U.S.C. § 1222 (1958).

⁶⁸ 8 C.F.R. § 232.1 (1958).

⁶⁹ 66 Stat. 198 (1952), 8 U.S.C. § 1223 (1958); 8 C.F.R. § 233.1 (1958).

failure to comply with the requirements of section 233 subjects the carrier to a fine of \$300, as set out in section 237.⁷⁰ Such detention expenses include those incurred by persons claiming United States citizenship whose claims are overruled.⁷¹

Section 237⁷² requires the immediate transportation of an excluded alien passenger to "the country whence he came in accommodations of the same class in which he arrived" on the same ship or plane, if practical. This expense, together with the cost of maintenance between arrival and departure, is chargeable to the transportation company.

Moreover, the statute makes it unlawful to refuse to take back for deportation an excluded alien passenger; to fail to detain a passenger on board or to fail (or refuse) to deliver a passenger for medical or other inspection; to refuse or fail to remove the passenger to the original foreign departure point; to knowingly bring to the United States a passenger who has previously been excluded or deported. The penalty imposed is \$300 per violation.⁷³ It is also unlawful to accept any consideration contingent on the successful entry of the alien into the United States.

If deportation proceedings are commenced at any time within five years after entry of an alien passenger for causes existing prior to or at the time of entry or within five years after the granting of the last conditional landing permit to a seaman, the cost of deporting the alien is chargeable to the transportation company which originally brought the alien in question to the United States. According to section 243(c),⁷⁴ such charges may be defeated only if the alien involved arrived in this country in possession of a valid unexpired immigration visa, the alien was inspected, and the alien was later admitted as a permanent resident alien. Failure to comply subjects the transportation company or its employees to a fine of \$300, as spelled out in section 237.

Passenger protection. Section 255⁷⁵ makes it unlawful for passenger ships or planes operating between the United States and a foreign port to employ feeble-minded, insane, epileptic, tubercular aliens or aliens afflicted with leprosy or any other dangerous contagious disease. If such an alien is employed and the United States Public Health Service certifies that the diseased condition existed at the time of hiring and was detectable, the transportation company is liable to a \$50 fine.

⁷⁰ 66 Stat. 201 (1952), 8 U.S.C. § 1227 (1958); see also, *American President Lines, Inc. v. Mackey*, 120 F. Supp. 897 (D.D.C. 1953).

⁷¹ *Pan American Airlines v. United States*, 122 F. Supp. 682 (Ct. Cl. 1954).

⁷² 66 Stat. 201 (1952), 8 U.S.C. § 1227 (1958).

⁷³ 8 C.F.R. § 237.3 (Supp. 1961).

⁷⁴ 66 Stat. 213 (1952), 8 U.S.C. § 1253(c) (1958).

⁷⁵ 66 Stat. 222 (1952), 8 U.S.C. § 1285 (1958).

Control of seamen. The temporary landing of alien crewmen is permitted, if authorized under sections 212(d)(3) or (5), 252, and 253.⁷⁶ If a crewman is a non-immigrant (section 101(2)(15)(D)) and a generally admissible alien, he may be granted a conditional landing permit⁷⁷ for the time the ship or plane remains in port or a maximum of twenty-nine days. Such a permit is subject to revocation, with the master then required to detain for deportation and any expenses being charged to the transportation company.⁷⁸

Hospital treatment for diseased or disabled seamen is authorized in section 253⁷⁹ with the expense chargeable to the transportation company,⁸⁰ but not deductible from the individual crewmen's wages.

All alien crewmen must be detained on board the plane or ship pending Immigration Service inspection (which may include a medical examination) and thereafter, upon being so directed by Immigration Service officers, or in the absence of section 212(d) or section 252 landing permits being issued to crew members. The detained crewmen must leave on the same plane or ship, unless other arrangements are made with the Immigration Service. If the Immigration Service officers direct the detention of the crewmen elsewhere than on board, the transportation company is nevertheless liable for the expense incurred.⁸¹

Any violation of section 254 subjects the carrier to a fine of \$1,000 per crewman with mitigation possible up to \$800 (or a minimum net fine of \$200) per violation.⁸² Interestingly enough, section 254(b) provides that, except as noted to the contrary in immigration regulations, proof that the alien crewman's name was not on the manifest or that he was not reported by

⁷⁶ 66 Stat. 187, 188, 219, 221 (1952), 8 U.S.C. 1182 (d) (3), (5), 1281, 1283; see also, 8 C.F.R. § 253.2(c) (Supp. 1961), relating to disabled and shipwrecked crewmen; *Ieronimakis v. Spence*, 257 F.2d 874 (4th Cir. 1958).

⁷⁷ 8 C.F.R. § 252.1(c) (Supp. 1961).

⁷⁸ 66 Stat. 220 (1952), 8 U.S.C. § 1282 (a), (b) (1958).

⁷⁹ 66 Stat. 221 (1952), 8 U.S.C. § 1283 (1958).

⁸⁰ 8 C.F.R. § 253.1 (1958).

⁸¹ 66 Stat. 221 (1952), 8 U.S.C. § 1284 (1958); see also, *SS. Marilena*, *Freedman & Slater*, 7 I & N Dec. 453 (BIA, 1957); *SS. American Eagle*, 7 I & N Dec. 235 (BIA, 1956); *SS. Lake Minnewanka*, 5 I & N Dec. 296 (BIA, 1953), citing *SS. Broompark*, unreported (BIA, 1944). See also, *West Indian Co. v. Root*, 151 F.2d 493 (3d Cir. 1945); *United States v. Arnold Bernstein S.S. Line*, 44 F. Supp. 19 (S.D. N.Y. 1941); *SS. Norress, Strackan Shipping Co.*, 4 I & N Dec. 228 (BIA, 1951); *SS. Alacran, Milne & Co.*, 2 I & N Dec. 507 (A.G., 1946).

⁸² *SS. Bellina, W. J. Browning & Co., Int.* I & N Dec. 1099 (BIA, 1960) wherein no liability was incurred for an attempt to land thwarted by drowning; *M/V Signiborg, Great Lakes Overseas Inc. & General Steamship Agencies Inc., Int.* I & N Dec. 1089 (BIA, 1960), in which both judicial precedents and unreported administrative rulings are discussed at length. See also, *M/V Arnfinn Stange, Smith & Johnson Inc.*, 8 I & N Dec. 639 (BIA, 1960).

the master as a deserter shall be prima facie evidence of a failure to detain or deport.⁸³

Section 256⁸⁴ makes it unlawful to "pay off or discharge" any nonresident alien crewman unless the Attorney General's consent is obtained in advance. The penalty per violation is \$1,000, with mitigation to a minimum fine of \$500 possible.⁸⁵

Encouraging the entry of an unacceptable alien seaman "with intent to permit or assist such alien to enter or land in the United States in violation of law" is penalized by a fine of \$5,000 per violation, with the ship or plane being subject to seizure and a libel action.⁸⁶

Stowaways. Section 273(d)⁸⁷ relates solely to alien stowaways. Failure to detain a stowaway on board (or at a designated place) or a failure to deport a stowaway renders the carrier liable to a fine of \$1,000 per stowaway. No temporary landing is possible for a stowaway and the master of a ship is considered responsible for the actions of his crew, apart from actual knowledge.⁸⁸ Lack of knowledge of the presence of stowaways does not serve to negative liability, in view of the statutory responsibility imposed.⁸⁹

Private aircraft. By means of section 239⁹⁰ entry into the United States of private planes, as well as the arrival of scheduled, supplemental or chartered

⁸³ A/S Clittre v. Dill, 152 F. Supp. 934 (S.D. N.Y. 1957), citing United States v. Mack, 295 U.S. 480, 484 (1935). See also, United States v. American President Lines, Ltd., 95 F. Supp. 371 (E.D. N.Y. 1951).

⁸⁴ 66 Stat. 223 (1952), 8 U.S.C. § 1286 (1958).

⁸⁵ 66 Stat. 223 (1952), 8 U.S.C. § 1286 (1958); SS. Federal Commerce, Raleigh Steamship Agency, Inc., 8 I & N Dec. 366 (BIA, 1959); SS. Evimar, Seacrest Shipping Co., 7 I & N Dec. 350 (BIA, 1956); SS. Lock Avon, Furness Withy & Co., Ltd., 7 I & N Dec. 215 (BIA, 1956); SS. Kamma Dan, West Coast Line, Inc., 6 I & N Dec. 518 (BIA, 1955); SS. Ciudad de Barquisimeto, Transportadora Grancolombiana Ltd., 6 I & N Dec. 311 (BIA, 1954); SS. Republic, Texas Transport & Terminal Co., Inc., 5 I & N Dec. 663 (BIA, 1954); N.S. Gen. Patrick, MSTs of Navy, 5 I & N Dec. 572 (BIA, 1953), citing the N.S. Gen. Freeman, MSTs of Navy, unreported (BIA, 1953) and SS. Wave Sovereign, Bowring & Co., 5 I & N Dec. 336 (BIA, 1953); SS. Capt. Papzoglou, Cottman Co., 5 I & N Dec. 567 (BIA, 1953). See also, United States v. Seaboard Surety Co., 140 F. Supp. 876 (D. Md. 1956), 239 F.2d 667 (4th Cir. 1957).

⁸⁶ 66 Stat. 223 (1952), 8 U.S.C. § 1287 (1958); United States v. The F. V. Hill, 78 F. Supp. 67 (S.D. Fla. 1947). See, SS. Greystock Castle and MV. Western Queen, Western Electric Co., 6 I & N Dec. 112 (A.G., 1954), in which section 273(a) was held inapplicable to seamen.

⁸⁷ 66 Stat. 228 (1952), 8 U.S.C. § 1323 (d) (1958).

⁸⁸ M/V Grove, Port Arthur Steamship Agency, 8 I & N Dec. 299 (BIA, 1959); SS. St. Tropez, A. C. Lombard's Sons, 7 I & N Dec. 500 (BIA, 1957); SS. Morning Light, States Marine Corp., 7 I & N Dec. 280 (BIA, 1956); SS. Monte Monjuich, Furness Withy & Co., Ltd., 5 I & N Dec. 601 (BIA, 1954); MV. Spenser, Ramsey Scarlett & Co., Inc., 5 I & N Dec. 563 (BIA, 1953).

⁸⁹ SS. Lionne, Hinkins Steamship Co., 8 I & N Dec. 19 (BIA, 1958). However, sworn statements by the ship's master and crew, contradicting an alien's statement that he arrived at a United States port aboard their vessel, served to overcome an adverse, but otherwise unsupported assertion by the alien. SS. Yarmouth, Eastern Shipping Co., 8 I & N Dec. 675 (BIA, 1960).

⁹⁰ 66 Stat. 203 (1952), 8 U.S.C. § 1229 (1958).

air carriers, is controlled through requirements that pilots give advance notice of intention to land and comply with "other reasonable" requirements,⁹¹ to facilitate inspection by the Immigration Service. The penalty for violation, which was initiated with the Immigration and Nationality Act, is \$500, with remission or mitigation possible. Failure to post the necessary bond may subject the plane to lien and summary seizure.⁹²

AGRICULTURE STATUTES

The Secretary of Agriculture administers a vast area of regulation arising under more than fifty statutes⁹³ and it is natural that many instances of administrative penalties are included within his jurisdiction. To be reasonably effective in enforcement of these laws within staff limitations, the Department of Agriculture seeks to obtain 95% compliance through education, or even industry warnings, with penalties only serving as the last resort. Penalties include fines and forfeitures enforced through administrative and judicial procedures. One kind of penalty (reparations), seems worth noting briefly in this paper.

Reparations. Section 308 of the Packers and Stockyards Act⁹⁴ makes violators of the terms of sections 304, 305, 307⁹⁵ or violators of orders of the Secretary of Agriculture under sections 301-303, 304-317⁹⁶ liable for full damages resulting to injured persons, with such liability enforceable by administrative proceeding under section 309,⁹⁷ or by an action in the appropriate United States District Court.

Under the Perishable Agricultural Commodities Act of June 10, 1930⁹⁸ reparations may be exacted for so-called unfair conduct violations under section 2 by commission merchants, dealers or brokers.⁹⁹ Upon complaint and answer, either with or without a hearing as the particular situation dictates, the Secretary may determine whether a violation in fact occurred, and, if so, direct payment of the amount of reparation fixed by him.¹⁰⁰

⁹¹ 8 C.F.R. § 239.2 (1958).

⁹² Plane N-813, Howard Aircraft, 7 I & N Dec. 584 (BIA, 1957). *But see*, Plane CUT-480, Pan American Airlines, 5 I & N Dec. 226 (BIA, 1953).

⁹³ E.g., Packers and Stockyards Act of 1921, 42 Stat. 164 (1921), 7 U.S.C. § 207(a) (1958). Perishable Agricultural Commodities Act, 46 Stat. 531 (1930) 7 U.S.C. § 499a (1958); Sugar Act of 1948, 61 Stat. 922 (1947), 7 U.S.C. § 1101 (1958); Agricultural Adjustment Act of 1938, 52 Stat. 31 (1938), 7 U.S.C. § 1281 (1958).

⁹⁴ 42 Stat. 165 (1921), 7 U.S.C. § 209 (1958).

⁹⁵ 42 Stat. 164-165 (1921), as amended, 7 U.S.C. §§ 205-208 (1958).

⁹⁶ 42 Stat. 163, 164-168 (1921), as amended, 7 U.S.C. §§ 201-203, 205-217 (1958); 56 Stat. 372 (1942), 7 U.S.C. § 217(a) (1958).

⁹⁷ 42 Stat. 165 (1921), 7 U.S.C. § 210 (1958).

⁹⁸ 46 Stat. 531 (1930), as amended, 7 U.S.C. § 499(a) (1958).

⁹⁹ 46 Stat. 532, 534 (1930), as amended, 7 U.S.C. §§ 499(b), 499(g) (1958).

¹⁰⁰ 7 C.F.R. 47.6 (1961).

Failure to pay the reparation award within the period specified (generally five days) subjects the person to a damage suit by the complainant or the beneficiary of the Secretary's order. Such action must be brought in the United States District Court within three years' time, with the findings and orders of the Secretary serving as *prima facie* evidence of the facts. This action is analogous to a suit to enforce a judgment and is purely an enforcement action. Costs and attorneys' fees of the petitioner prevail.

Appeals from administrative reparation orders may also be taken to the appropriate United States District Court within thirty days, with a trial *de novo* being held.

PROCEDURAL ENIGMA

Even though administrative penalties affect the livelihood and activities of scores of persons, this area is singularly underdeveloped in a procedural sense. While uniformity for its own sake is senseless, uninhibited informality under the guise of administrative discretion is equally unwise. The need for some procedural standards or a procedural framework to support the recovery of administrative penalties would seem to be logical, as well as helpful in warding off carelessness in agency action, confusion in the mind of the lay public, or the hazards of governmental slow down from lack of direction in the adjudicative process. Such has been the view of various objective legal experts studying this area during the past twenty years.¹⁰¹

The dangers and difficulties inherent in the rise of the administrative money penalty device were noted by the Attorney General's Committee on Administrative Procedure in 1941. This device had been used widely by such agencies as the Bureau of Marine Inspection and Navigation and the Civil Aeronautics Administration with unfortunate results, e.g., the United States Attorneys in the New York City area were harassed by a flood of petty, distasteful and time consuming enforcement suits in navigation cases.^{101a} With the breakdown of collections, violations naturally increased with impunity.

The Committee's Final Report warned against extensive use of the money penalty device, because of the consequent and excessive burden on

¹⁰¹ See generally, Attorney-General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, S. Doc. No. 8, 77th Cong., 1st Sess. (1941); *Task Force Report on Legal Services and Procedure*, Commission on Organization of the Executive Branch of the Government, 33, 242-245 (March 1955); *A Report to Congress—Legal Services and Procedure*, Commission on Organization of The Executive Branch of the Government, 84-85 (March 1955); American Bar Association Resolution, 81 A.B.A. REP. 384-385 (1956), 8 AD. L. BULL. 9 (1956).

^{101a} Attorney General's Comm. on Administrative Procedure, *Administrative Procedure in Government Agencies*, *supra* note 101 at 146-147 (Bureau of Marine Inspection and Navigation), 174-175 (Civil Aeronautics Administration).

the federal courts for collection and recommended such procedural reforms as notice and hearing.¹⁰²

In its Report of March 1955, the Hoover Commission Task Force on Legal Services and Procedures, in commenting on the imposition of money penalties, remission or compromise of such penalties, and award of reparations or damages, asserted that this power should not be delegated to an agency,¹⁰³ except under severe limitations and safeguards (right of notice and hearing being minimal requirements), with the amount of the penalty and the manner of computation being fixed by statute, rather than left to administrative discretion.

Summary power to impose money penalties should be authorized only in extreme emergency cases, according to the Report.¹⁰⁴ Moreover, when the power to impose and the power to remit money penalties are left to the same agency, the Task Force Report suggested that special procedural safeguards were necessary, with agency hearings being held in connection with remissions and mitigations. Furthermore, it was concluded that in this penalty area, constant legislative reevaluation of the original administrative delegation is required.

In 1955, the Administrative Law Section of the American Bar Association raised its voice against the imposition of administrative penalties without the benefit of reasonable procedural safeguards. The Section's resolution was phrased as follows:

Be It Resolved, That it is the view of the American Bar Association that legislation authorizing Federal agencies to impose money penalties for alleged violation of law or regulations should not be authorized as a regulatory device except upon a most convincing justification and subject to fair procedural safeguards, including (1) a clear statutory specification of the offense subject to the money penalty sanction, (2) provision for adequate and fair procedures, including notice to the accused and opportunity to answer prior to imposition of the penalty, and (3) other safeguards to avoid an agency prejudgment of guilty and the imposition of double penalties for the same offense and to afford opportunity for a fair hearing.¹⁰⁵

On February 20, 1956, the American Bar Association House of Delegates directed its Administrative Law Section to take the necessary action, pursuant to the above resolution to assure that "legislation authorizing Federal agencies to impose money penalties for alleged violation of law or regulations should not be authorized as a regulatory device except upon a most

¹⁰² *Id.* at 174-175.

¹⁰³ Task Force Report, *supra* note 101 at 242-245.

¹⁰⁴ *Id.* at 243; see also, *Oceanic Steam Navigation Co. v. Stranahan*, 214 U.S. 320 (1909).

¹⁰⁵ 7 *AD. L. BULL.* 9 (1956).

convincing justification and subject to fair procedural safeguards.”¹⁰⁶ To date, the Section has merely sought to measure various legislative proposals against the Association’s view, as set out in the resolution and implementation.

Except for an incidental provision in the Federal Aviation Act¹⁰⁷ penalty bills have generally escaped the active attention of Congress in recent times. Consequently, the way still lies open for legislative proposals in the various administrative areas crystallizing the ABA’s view that there is need for reasonable procedural safeguards in the imposition of administrative penalties.

The fact that the American Bar Association and its Administrative Law Section are committed to a legislative approach to insure due process and adequate procedural safeguards in the imposition of administrative penalties does not rule out the possibility of advances in the area of the administrative imposition of money penalties through informal means. The charting of fair procedural safeguards outlining an administrative penalty procedural framework via administrative regulations would also serve as an encouraging interim step. Negotiations to this end are clearly within the scope of the Administrative Law Section’s jurisdiction.¹⁰⁸ However, impetus for such changes should not be allowed to wane. The Association, being committed to a position in this area, should translate its view into affirmative action at every opportunity.

MISCELLANEOUS LEGISLATIVE PROPOSALS

The authority to impose civil penalties for violations of economic provisions of the Civil Aeronautics Act has been repeatedly requested by the CAB in recent years.¹⁰⁹ Such a proposal came before Congress as an amendment to the Federal Aviation Act in 1959 but failed of enactment.¹¹⁰

The Air Transport Association, the “voice” of the aviation industry, has traditionally opposed such a statutory change for understandable reasons. In testimony before Congress in April 1955, an ATA spokesman stated:

The Board has taken the position that, notwithstanding the existence of both administrative and criminal remedies for economic violations, it needs the additional authority to impose civil penalties in such cases. We do not believe that the Board should have that authority. As a practical matter, the authority to impose civil penalties results in the

¹⁰⁶ 81 A.B.A. REP. 384-385 (1956).

¹⁰⁷ 72 Stat. 731, 783 (1958), 49 U.S.C. §§ 1301, 1471 (1958).

¹⁰⁸ 75 A.B.A. REP. 407, 446 (1950).

¹⁰⁹ *E.g.*, S. 250 8, 85th Cong., 1st Sess. (1954).

¹¹⁰ S. 1542, 86th Cong., 1st Sess. (1959).

ex parte determination of many charges of law violation. A complaint to the Board, or an accusation by a member of the Board's staff, can result in notice to the carrier that it has violated the law and that a civil penalty of, say, \$100 should be paid. The carrier, even though it feels confident that no such violation did occur or that the amount of the penalty is excessive for the violation alleged, is faced with the choice of paying the penalty, or of having to defend a suit brought to enforce the penalty, at an expense probably greatly in excess of the penalty itself. The result is that the carriers can be harassed by a succession of penalties, no one of which justifies the expense of litigation. We believe the Board has ample authority at the present time to enforce the economic provisions of the Act.¹¹¹

In opposition to another similar bill, ATA commented in April 1958 as follows:

While this procedure may be a convenience to the Board, we think that it has inherent dangers. We have had enough experience with the civil penalties which the Post Office Department formerly imposed for minor violations by the carriers in the transportation of air mail — and civil penalties which the Immigration and Naturalization Service now imposes for minor violations by the carriers of the regulations of that agency — to know how serious those penalties can be. While individually they may not be large enough to warrant, or even permit, the carrier to contest the penalty, the aggregate over a period of a year, for example, can become pretty formidable. If the Board were to impose a penalty on a carrier of \$25.00 for some minor violation, the carrier would not be justified, from an expense point of view, in contesting the penalty or even negotiating for a compromise. Thus, the carrier probably would pay the penalty even though it had a good case, and even though the Civil Aeronautics Board might clearly be wrong. The airlines might, to use a common expression, "be nickled and dimed to death" by the aggregate of a large number of small penalties, no one of which is sufficiently important to contest.¹¹²

The amendment to the Federal Aviation Act, referred to earlier, would have denied to air carriers the right to have adjudicated, either by the Board in an administrative proceeding, or by a court of law, determinations made by the Board's staff that a carrier has violated a CAB economic regulation. However, Congress did not see fit to take action on this bill and it died as had its predecessors.

¹¹¹ *Hearings before the Committee on Interstate and Foreign Commerce, House of Representatives*, 83d Cong., 2d Sess. on H.R. 6817, H.R. 6818, and H.R. 7394, June 24, 1954, p. 24.

¹¹² *Hearings before Subcommittee of Congress on Interstate and Foreign Commerce, Committee of House of Representatives*, 85th Cong., 2d Sess. in H.R. 8703, H.R. 5239, S. 1380, H.R. 6419, S. 1749, April 22, 1958, p. 41.

Both industry and the bar view the forfeiture as an administrative pre-judgment of guilt, which is in essence a penalty assessed without notice, narrowly constitutional, and casting on the accused the burden of overcoming the presumption of guilt.

In 1955, S. 1549¹¹³ was proposed, whereby section 503(c)¹¹⁴ would be added to the Communications Act and provide for forfeitures of \$100 for each violation of FCC regulations relating to radio stations (excluding only broadcast stations), with the money penalty being subject to remission or mitigation. These forfeitures were in addition to penalties or remedies already available to the FCC for enforcement purposes. The FCC, in requesting this authority, was of the opinion that it would create an attitude of responsibility leading to compliance with all regulations. A similar request was rejected in 1952.¹¹⁵

The offenses serving as the basis of forfeiture were not outlined in S. 1549. Hence, interested groups protested this proposal as an administrative blank check to penalize; as an unwise and drastic delegation of congressional authority without specific, persuasive justification; and as an unnecessary sanction, in view of the variety of enforcement weapons already available to the FCC.¹¹⁶ Moreover, it was felt that such authority would greatly impair the existing cooperation between the FCC and most radio licensees, with a mere \$100 penalty being no real deterrent to a determined violator.

The ABA Administrative Law Section's main objections to this bill were the lack of desirable procedural safeguards to persons affected and the fact that a hearing would be granted only after the imposition of the penalty. The procedure required by section 312¹¹⁷ was suggested alternatively, for it "follows the traditional approach of first granting an opportunity to the accused to be heard before there is any decision as to the imposition of a penalty or other sanctions."¹¹⁸ The Section's analysis of S. 1549 concluded that:

It is, of course, more convenient and less cumbersome for an administrative agency to follow the "traffic cop" approach to enforcement of the law by making it easier for the party involved to pay a relatively small fine for the alleged offense, rather than assuming the burden of making a contest of it. A record of forfeitures is, however, quite a serious matter so far as a radio licensee is concerned, particularly when

¹¹³ S. 1549, 84th Cong., 1st Sess. (1955).

¹¹⁴ The bill, however, failed of enactment.

¹¹⁵ S. Rep. No. 1750 and H.R. Rep. No. 2426, 82d Cong., 2d Sess. (1952).

¹¹⁶ 48 Stat. 1100, 1086, 1092, 1084, 1085 (1934), as amended, 47 U.S.C. §§ 501-502, 312(a), 401(a), 307(d), 308(b) (1958).

¹¹⁷ 48 Stat. 1086 (1934), as amended, 47 U.S.C. § 312 (1958).

¹¹⁸ 7 AD. L. BULL. 220 (1955).

an application for a renewal of, or for an additional, license is in issue. It would thus appear undesirable for the administrative agency to be able to apply forfeitures by short-cutting the traditional procedures. In this connection, it is of interest to note that under the forfeiture provisions proposed in S. 1549, the burden of obtaining a remission or mitigation of the forfeiture is apparently placed on the party subjected to the forfeiture (Section 504(b) of the Communications Act). In contrast, Section 312(d) of the Communications Act provides that in case of a hearing as to a proposed cease and desist order, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the Commission.¹¹⁹

A glance at later bills reveals that some notice was taken of these strong objections. H.R. 6748¹²⁰ spelled out certain violations to be penalized; allowed a ninety-day notice period before forfeiture liability attaches; outlined certain minimum procedures (written notice giving facts, an opportunity to show cause in writing, and an opportunity for an interview discussion of the violation on request). Such an interview procedure has been in use for a considerable period in the immigration fine area, although it has never been viewed with great enthusiasm by the airlines and steamship companies concerned. Nor did such a proposed procedure for forfeitures evoke much support for favorable comment in communication circles.

A similar procedural format was set out in S. 1978¹²¹ which proposed the addition of a section to the Communications Act, giving the FCC authority to impose forfeitures for violations of Commission rules and regulations in common carrier, safety, and special fields. This bill was reintroduced in similar form as S. 1737 and H.R. 6574,¹²² at the request of the FCC to reinforce normal enforcement methods, which are either too drastic or too cumbersome in combatting widespread disregard of Commission regulations in expanding nonbroadcast radio services on ships and other means of transportation.¹²³

S. 1978, which outlined forfeitures, ranging from \$100 to \$500, with liability attaching only in case of wilful, negligent or repeated violations, was passed by the Senate on August 21, 1959. Both S. 1737 and H.R. 6574 failed to become law.

Next came S. 1898,¹²⁴ which provided that a broadcast licensee who fails to observe, or violates an FCC rule or regulation shall, on Commission order,

¹¹⁹ 7 AD. L. BULL. 220, 221 (1955).

¹²⁰ H.R. 6748, 85th Cong., 1st Sess. (1957).

¹²¹ S. 1978, 85th Cong., 1st Sess. (1957).

¹²² S. 1737, 86th Cong., 1st Sess. (1959); H.R. 6574, 86th Cong., 1st Sess. (1959).

¹²³ S. Rep. No. 695, 86th Cong., 1st Sess. (1959), favorably reporting S. 1737.

¹²⁴ S. 1898, 86th Cong., 2d Sess. (1960).

forfeit one thousand dollars for each day of nonobservance or violation. According to the ABA view, voiced by spokesman Donald C. Beelar:

Such broad authority to impose fines for disregard or non-observance of any one of literally thousands of agency rules, now or hereafter adopted without any procedural safeguards, would flout basic principles of fair play. . . . The American Bar Association is opposed to such broad and unrestrained delegation of authority. The omission from Section 7(b) of S. 1898 of any requirement for notice of opportunity of a licensee to institute corrective action would amount to indirect modification of existing legislative policy expressed in Section 9(b) of the Administrative Procedure Act. . . . Unless there is some change made in this Act which would distinguish it from other agency acts, I don't think you have a day in court upon the conclusion of agency findings.¹²⁵

But fortunately, such changes were made in S. 1898 prior to its enactment as P.L. 86-752. Section 7, as enacted, defined the offenses in a new subsection (b)(1) of section 503 of the Communications Act;¹²⁶ made provision for written notice of liability with an opportunity to reply within a reasonable period in subsection (b)(2); provided for a one year statute of limitation for levying of such forfeiture penalized by a maximum fine of \$10,000 under subsection (b)(3); with a court, after a trial de novo, ordering payment of the penalty, according to amendments to section 504 of the Communications Act,¹²⁷ found in section 7(b) and (d).

SWORD OF DAMOCLES

At best, administrative penalties are a procedural enigma. To those knowledgeable in the workings of the governmental process, such penalties are an administrative Sword of Damocles, unprotected by conventional due process safeguards and judicial review.

The administrative money penalty may be known by a variety of pseudonyms, but as was Shakespeare's rose it is always recognizable and similar. An administrative fine or forfeiture or civil penalty is an extraordinary device, not covered by Administrative Procedure Act limitations. Imposition of such a penalty generally occurs as a result of either an ex parte staff evaluation of the case or after an informal conference between the staff and the accused or both.

Because an administrative penalty may be asserted without regard to good intentions, lack of actual knowledge or absence of injury to any public

¹²⁵ *Hearings on S. 1898*, 86th Cong., 90-93, 98-99.

¹²⁶ 48 Stat. 1101 (1934), 47 U.S.C. § 503 (1958).

¹²⁷ 48 Stat. 1101 (1934), as amended, 47 U.S.C. § 504 (1958).

or private interest, this power may be susceptible to arbitrary application, misuse, and abuse. Hence, the practice has been characterized as tantamount to administrative blackmail, with the price of avoiding litigation being loss of fair procedural safeguards.¹²⁸

The consensus is that great caution should be exercised in any authorization of money penalties, with the particular offenses being spelled out in the statutes and a procedural framework being outlined. However, lack of procedural safeguards may not, and indeed should not, be compensated for solely by means of a provision for judicial review.

When money penalties may be imposed by a federal agency, such action should occur only as a result of a mature administrative proceeding — one which is impartial and reasonably expeditious, yet protected by judicial review (possibly a hearing *de novo* in some instances to counteract the problem of substantial evidence). Otherwise, administrative penalties will remain a procedural enigma and a governmental Sword of Damocles.

¹²⁸ 4 W. POL. Q. 610 (1951).